SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 564.

PEN LVANIA COMPANY, PLAINTIFF IN ERROR,

vs.

MARION DONAT, DEFENDANT IN ERROR.

MOTION TO DISMISS OR AFFIRM OR TRANSFER TO SUMMARY DOCKET.

BRIEF.

RUFUS S. DAY, and
SAMUEL HERRICK,
Attorneys of Record for Defendant in Error.

R. B. NEWCOMB,
A. G. NEWCOMB,
E. C. CHAPMAN,
GEORGE M. SKILES,
THOMAS J. GREEN,
ROSCOE C. SKILES,
JAMES B. HARPER,
OTTO E. FUELBER,
Counsel for Defendant in Error.

(24,847)

INDEX.

AUTHORITIES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 564.

PENNSYLVANIA COMPANY, PLAINTIFF IN ERROR,

vs.

MARION DONAT, DEFENDANT IN ERROR.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM JUDGMENT OR TO TRANSFER TO THE SUMMARY DOCKET.

Now comes the defendant in error, Marion Donat, by his attorneys of record herein, and moves this honorable court:

First. To dismiss the writ of error herein on the ground that the question upon which the decision in this cause de-

pends is so frivolous as not to need further argument, having been repeatedly decided by this court contrary to the contentions of the plaintiff in error; and that the petition for writ or error was filed in this case for purpose of delay.

Second. To affirm the judgment of the United States Circuit Court of Appeals on the ground that the question upon which the decision in this cause depends is so frivolous as not to need further argument.

Third. To transfer this cause for hearing to the summary docket, if this court should decline to dismiss or affirm, because the case is of such a character as not to justify extended argument.

RUFUS S. DAY,
SAMUEL HERRICK,
Attorneys of Record for Defendant in Error.

NOTICE OF MOTION.

The plaintiff in error is hereby notified that the defendant in error will on the 18th day of October, 1915, in the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of the said court the foregoing motions, and each of them, and the brief in support thereof, hereto attached, including portions of the record relating to the question of law involved in this cause, all of which are now served upon you herewith.

RUFUS S. DAY,
SAMUEL HERRICK,
Attorneys of Record for Defendant in Error.

Copy of foregoing motion and notice, together with statement of facts, points and authorities, etc., and argument received this ..... day of September, 1915.

....,
Attorney of Record for Plaintiff in Error.

BRIEF IN SUPPORT OF MOTION.

Statement of the Case.

This suit was instituted by the defendant in error, Marion Donat (hereinafter styled the plaintiff) against the plaintiff in error, the Pennsylvania Company (hereinafter styled the defendant) on March 12, 1914, in the United States District Court for the District of Indiana. It is an action to recover damages for personal injuries received by plaintiff while engaged in interstate commerce in the employment of the defendant company. The action was based on the employers' liability act of April 22, 1908 (35 Stat. at L., 65, Chap. 149; U. S. Comp. Stats. Supp., 1911, p. 1322).

In the United States District Court for the District of Indiana the complaint was in two paragraphs, the first of which was withdrawn, and the action tried on the second paragraph, and the answer of general denial filed thereto by the defendant. The jury returned a verdict in favor of the plaintiff in the sum of Eleven Thousand Two Hundred and Fifty Dollars. Judgment was rendered accordingly, and defendant's motion for a new trial was overruled. The case was then taken to the United States Circuit Court of Appeals for the Seventh Circuit on writ of error to the United States District Court. The United States Circuit Court of Appeals, on May 19, 1915, in an opinion rendered from the bench, affirmed the judgment of the lower court; the case is in this Court on writ of error to the United States Circuit Court of Appeals for the Seventh Circuit, issued June 17, 1915.

(The transcript of record in this case has been filed in this Court, and we have printed herein sufficient portions of it to bring to the court's attention the evidence, and questions of law involved.)

THE COMPLAINT.

The complaint charged in substance as follows:

"That on the 19th day of March, 1913, the defendant owned and operated a line of railroad from the City of Philadelphia, in the State of Pennsylvania, through the States of Ohio and Indiana, and through the City of Fort Wayne, Indiana, to the City of Chicago, in the State of Illinois, and is a non-resident of the State of Indiana and is organized under the laws of Pennsylvania and is a citizen of said State; that on said day, in said city of Fort Wayne, the defendant had a certain switch track leading from its main track into the plant of the Olds Coal Company, a corporation which at said time was engaged in the coal business in said City of Fort Wayne; that said switch track extended into the coal house and premises of said coal company so that coal could be delivered in carload lots to said coal company over the defendant company's line and railroad; that said switch track was constructed into, along and under an arch inside of said company's coal house, for a distance of, to wit, one hundred feet; that in said coal house and under said switch track there was on said day erected a coal-chute, or unloading pit, over which gondola and other cars loaded with coal were placed for unloading; that said defendant company constructed its said tracks over and across said unloading pit, which was twelve or more feet in width and a like number of feet in depth; that the defendant negligently constructed said switch track over said unloading pit and carelessly and negligently failed and neglected to place any barrier, or barriers, or guard-rails on the sides of said unloading pit in the space between the coal house and its cars, when said cars were so placed on said switch track, or place any light at said place to prevent its employees from falling into said pit when acting within the line of their duty; that it was the duty of the defendant to exercise ordinary care for the safety of its employees, and the plaintiff

herein, and to furnish and provide plaintiff with a reasonable safe place in which to perform his duty as such employee; that said place was unsafe and dangerous to the lives and limbs of the defendant company's employees, by reason of the absence of any barriers or lights at the point where said pit was and is so located under and across the switch track of the defendant; that the plaintiff and the defendant company, on said day, were engaged in interstate commerce and said switch track in said coal house was used for said purpose; that on said day, at the hour of eleven o'clock P. M. in the night time, plaintiff, acting under the orders of his superiors, was directed to deliver certain cars then and there used in interstate commerce, and loaded with coal, to said coal company on its said switch track; that in order to deliver said cars upon said switch track, so constructed and used by said defendant company, in said coal house, it was necessary for plaintiff to remove from said switch track so located in said coal house, two empty freight cars then and there standing on said switch track; that said empty cars were then and there used and had been used in interstate commerce, in the shipment and delivery of coal to said coal company, and that the plaintiff had no knowledge pany, and that it was the duty of the plaintiff to superintend the removal of the said empty freight cars from said switch track on said coal company's premises; that it was necessary for the plaintiff to enter the passageway or space in said coal company's premises and walk along the passageway or space between said empty freight cars and the side of said coal house, for the purpose of performing said duty; that the plaintiff had never before been upon said coal company's premises or along said switch track, and that the defendant company negligently and carelessly failed and neglected to give plaintiff any notice of the existence of said pit under and across said switch in said coal house of said coal company, and that the plaintiff had no knowledge or notice of said premises or of said open and unguarded coal-chute or unloading pit, under said switch track, or that the same was unsafe, dangerous, and un-

guarded; that in the discharge of his duty the plaintiff proceeded, with ordinary care, along the space between said empty freight cars and said coal house, and without any warning or knowledge of the unguarded and unlighted coal pit, and fell head foremost into the same; that said fall fractured his skull, produced concussion of the brain, and rendered him unconscious thereafter and injured his neck and spinal column, bruised, sprained and crushed his head and body, producing a lasting shock to his nervous system." (This was taken verbatim from the bill of exceptions.)

THE EVIDENCE.

Testimony of Noble J. Olds, on behalf of plaintiff.

Direct Examination.

My name is Noble J. Olds. I live in Fort Wayne, Indiana. I am engaged in the coal business. I am secretary and treasurer of the Olds Coal Company, whose plant is located on Wallace Street to Murray Street, a distance of three hundred feet; the coal house is of modern construction and built with an overhead or porch, and coal bins underneath on the west side, and is about three hundred feet in length and fifty-seven feet in width. The Pennsylvania Company has a siding on Murray Street and we tap that siding for our private switch track. The switch track comes in on the east side of the building and goes to the bins. The bins have lift buckets from which we load the wagons.

The picture marked "Exhibit A" shows the exterior of the building on the north side and shows the entrance of the switch track into the building. The Pennsylvania Company constructed this switch, and it extends the full length of the building, about three hundred feet. Cars are run in and on that switch for the purposes of unloading. The picture marked "Exhibit A" represents a car just entering the switch track from Murray Street and is used by the Pennsylvania Company for putting cars into our coal house. There is a

space between two and one-half and three feet between the side of a freight car when it is placed on our switch track, and the side of the building to the west. On the east side there is about the same space. At a point 160 or 170 feet, or a little over half way from the entrance to the coal house, there is a pit; this pit extends clear under the switch track and is about fifteen feet wide, east and west, and is about fifteen feet long, north and south; it is built on an incline under the car, so that it shoots the coal over to the west side where the pit becomes deeper, and where we run our buckets down into it to gather up the coal. The picture marked "Exhibit B" shows the side of the pit with a car standing over it. At the point between the car which stands over the pit and the side of the building on the west, the pit is from seven to ten feet deep; it is nearer ten feet than seven feet; the middle is ten feet and the side is about seven feet. The pit is constructed throughout of concrete. I remember that a man was hurt in thereon March 19, 1913. At the time there was no light about the pit, nor any barriers placed anywhere about the pit or to keep anybody from walking into it. Ordinarily you could see the outline of the pit, but on a dark night it would be obliterated. On the night of March 19, 1913, there were cars standing on the switch track.

On cross-examination witness testified:

I have no record of the cars which were on the siding except the demurrage record furnished by the Pennsylvania Company. I took the number of these particular cars from that record. The only thing that I know about these particular cars being upon the track at that time is from the record furnished by the Pennsylvania Company. The record shows when the cars were placed and when they were released.

Redirect examination:

The entrance of the shed, where the track enters our building, is about thirty-five or forty-five feet high.

The Pennsylvania Company has been using that track to bring coal into our house, in the condition it was in on the 19th day of March, 1913, since we began to use the building on the 15th or 17th day of January, 1913.

Further cross-examination:

The switch track from the sidewalk or curb was paid for by us. It is absolutely under our control and management. We absolutely own the track inside of our building and on our private grounds.

Further redirect examination:

The Pennsylvania Company would send their servants in there to take out empty cars and put loaded cars in at all times of the day, and night.

Further cross-examination:

The Pennsylvania Company, by special arrangement, switched the track only at night time.

Testimony of H. L. Bley, on behalf of the plaintiff:

My name is H. L. Bley. I live at No. 2803 Hanna Street, Fort Wayne, Indiana. I am general yardmaster of the Pennsylvania Company, having been so for about fourteen years. As yardmaster I keep a record of the arrival and departure of all freight cars. I remember the occasion of a man being injured at the Olds Coal Company, some time in March. I have a record of the cars loaded with coal for the Olds Coal Company, on or about March 19, 1913. This record is kept in card form, as we keep no book record in the yard office. The record shows that St. L. and S. F. car 123,040 was received from the Wabash Railroad Company for the Olds Coal Company and is receipted by conductor E. H. Repine. After the car came into our

possession it went from the Wabash transfer to track number one—what we call the Toledo Street track. The next I got it is it coming out of the Olds Coal Company on March 19, empty, and the receipt signed by M. Donat; the receipt shows that it came out of the Olds Coal Company on March 19th; it was brought out by conductor Donat empty. I do not know where the cars originally came from, but the Pennsylvania Company got the car on March 18th. Car K. & M. 6689 arrived from Ridgeville, Indiana, March 16, 1913, loaded with coal for the Olds Coal Company. I have no record of its delivery, but I have a record of its coming out of there on March 19th, and the record is signed by M. Donat. Car No. 298,403, P. R. R. arrived on March 18th from Lima, Ohio, over the Pennsylvania Road, and went into the Olds Coal Company's plant, on March 19th and the record was signed by conductor Donat. Car No. 40236 N. & W. arrived March 18th from Suzanna Mines, loaded with coal and was delivered to the Olds Coal Company on March 19th by Mr. Donat, conductor.

Testimony of E. H. Kirkland, on behalf of plaintiff:

My name is E. H. Kirkland. I live at No. 134 Washington Bouv. W., and am the freight agent for the Pennsylvania Company at Fort Wayne, Indiana. I have been holding that position since December 1, 1899. I keep the records of the shipping point or points from where freight cars are shipped. Car No. 123040 St. L. & S. F. was received from the Wabash Railroad at Fort Wayne, loaded with coal for the Olds Coal Company. I do not know what the shipping point was; the record does not show. Car K. & M. No. 6689, loaded with coal, arrived March 16, 1913, from Marting, W. Va., consigned to the Olds Coal Company. I do not know whether it was delivered to the Olds Coal Company or not. Car No. 298403 P. R. R.,

loaded with coal, was shipped from Minnehaha Mines, Ohio. I do not know whether it arrived on March 18th, 1913, or not. The shipment originated on another road and reached the P. F. W. & C. Wwy., at Bucyrus, Ohio, and was consigned to the Olds Coal Company. Car 40236 N. & W., on March 18, 1913, was loaded with coal, at Suzanna, West Virginia, was delivered to the Olds Coal Company. I do not know the date of delivery.

Testimony of G. W. Johnson, on behalf of plaintiff:

My name is G. W. Johnson. I live at Huntertown, Allen County, Indiana, for the last two years and three months I have been employed by the Pennsylvania Company as a brakeman, and was so employed on the 19th day of March, 1913. I was brakeman in the Fort Wayne yards and worked from 12 o'clock noon to 12 o'clock at night. My conductor was Marion Donat; I was a member of his crew. I remember taking some cars of coal over to the Olds Coal Company on that night; it was dark. We came in there from the east and cut off our cars on the track and went in to take out the empties. I rode on the pilot of the engine; when I coupled the car over the coal pit it was very dark in there and there were no lights. I heard the conductor groan and walked up close enough to the pit, with my lantern, to throw the light in, and found him lying face downward in the bottom of the pit; he was unconscious. There were no lights or barriers around the pit anywhere; no coal in pit; only coal dust and a little water.

Cross-examination:

The pit is about one car length from the door of the building where we entered. The empty cars were on the track in the building; I think there were two of them. The pit is built deeper some places than others.

The bottom was on an incline of forty-five degrees; the side of the pit was about seven and a half or eight feet deep, and the bottom of it, I should judge, nine or nine and a half feet deep. We came in there from the east and cut off our cars on the track and went in to take out the empties.

Testimony of C. W. Comparet, on behalf of the plaintiff:

My name is C. W. Comparet. I live at 117 Elmwood St., Fort Wayne, Indiana; my business is that of yard brakeman for the Pennsylvania Company. I have been employed in that capacity for about three years, in October. Mr. Donat was my conductor. I recall the time that Donat was injured at the Olds Coal Company. We got two cars of coal on Toledo Street to take over to the Olds Coal Company. I was with the crew when they arrived at the Olds Coal Company plant, or yards; I stayed outside of the building until the engineer came out and said that the conductor had fallen into the pit. I went into the building in about three minutes after the engineer told me. There were no lights or barriers about the pit. Donat was down in the pit when I went in. Mr. Donat went into the building first and they followed him with the engine.

Cross-examination:

The engine was just west of the building when Donat went in. The conductor usually finds out what work he is to do. He precedes the rest of the crew to find out what is to be done.

My name is Marion Donat. I reside in the City of Fort Wayne. I am plaintiff in this case. I worked for the Pennsylvania Company pretty nearly eleven years. I was extra yard conductor on the night of

March 19, 1913,—the night I got hurt. On that night I had two cars of coal to deliver at the plant of the Olds Coal Company. I had never been in the place before. When we arrived at the Olds Coal Company plant there were two empty cars on the Olds Coal Company's tracks. We had to take out the empties before we could put in the loaded cars; we had to put the loaded cars on the same track that the empties were. As conductor it was my duty to take the record of the empty cars. When we arrived at the Olds Coal Company's plant we cut the two loaded cars off the engine and let them stand on the track on Murray Street, and came in with the empty engine to take the two empty cars out. At the time I got hurt I was taking the number of the empty cars. I had my lantern on my left arm and had a card with the numbers of the empty cars in my hand. I take the numbers of all empty cars that are taken out of switch tracks and turn them over to the yard office so that they know where these empty cars are. While I was taking the numbers I fell into the hole. I do not remember what happened afterwards.

Cross-examination:

We do not take the empties out unless we have other cars to put in. Sometimes we take the empties out if there is a special order. The night of the accident we had two loaded cars and we took them over to the Olds Coal Company. In order to get to the Olds Coal Company from the Pennsylvania Company, we had to cross the Wabash tracks and go down two streets. We ran the cars down the center of Lafayette Street into Murray Street, and then turned west on Murray Street. As we came down Murray Street we had two cars ahead of the engine. The engine being headed east and backing west. When we got down pretty close to the coal switch that goes into the Olds Coal Company's plant, we cut off the engine, leaving the two loaded cars stand east of the switch, so that we could go in and get the empties and pull them out. We stopped

east of the coal company's switch, uncoupled the engine and then ran the engine further, west on the Murray Street track. I went into the coal company's shed to look at the empty cars and take the numbers. In doing so I walked along a pathway between the building and the cars. I got the number of the first, but not the second when I fell into the hole.

Testimony of H. L. Bley, on behalf of the defendant:

At the time Donat was injured there was a card furnished by the agent to the assistant yard master at Lafayette Street, for two empty cars to come out of the Olds Coal Company's plant; two loaded cars were located at the time on Toledo Street which were to be placed in the Coal Company's house. The Coal Company's house would hold five or six cars—may be more. Exhibit "E" is a card furnished the assistant yard master and was evidently given Donat on the night of the accident. When the conductor receives the card and executes the order, he signs the card and turns it into the yard office. I cannot tell whether this was the card which was given to Donat or not. It has Donat's name on it. (It was admitted by both parties that Exhibit "E" is the card issued to Marion Donat, on which he moved the cars in question.)

Cross-examination:

I think it was necessary in order to place the two loaded cars on the Olds Coal Company's tracks, that they had to take out the two cars that were in on that track.

Redirect examination:

I do not know how many cars were in on that track that night. The loaded cars could have been put in

there without taking the two empty cars out, but they were ordered to take those two cars.

Recross-examination:

The cars were to be delivered at certain bins. It would be necessary to remove the empty cars in order to set them.

Redirect examination:

The reason we took the empty cars out was because they were ordered off the track. They were to be brought out and disposed of. We ordered them taken out because we wanted to take them away.

Recross-examination:

It was necessary in order to put the other cars in there.

Testimony of C. W. Comparet, on behalf of the defendant:

I am the same Mr. Comparet who was on the witness stand yesterday. I was one of the brakemen of the crew that moved the cars on the night of the accident. The track at the Olds Coal Company's plant would ordinarily hold seven cars. If there is a hopper or two among the cars it would hold eight cars. There are different bins along the Olds Coal Company's tracks; we spot the cars at the bins and the order shows where to spot them. If they would have to be spotted at the pit we would have to take out the empty cars. We were ordered to spot these cars at a particular place. I do not remember just where. The only necessity for getting the empty cars out was to make room for the two loaded cars. There was enough room without taking the two empty cars out. The orders received from the company showed where to spot these cars.

Testimony of Marion Donat, witness recalled on behalf of defendant:

I do not think I had orders to take the two empty cars out. We had to take them out. We do not take the empty cars out unless we had loads to go in. I do not think that is my signature on the card marked Exhibit "E." I had a card something similar to that. I had no particular order for these two cars, but it was our duty, if they were in the way, to take them out. I do not think I removed the cars by reason of any order. I got the card that night over at Puzzle Switch Shanty. The first two items as shown on the card marked Exhibit "E" means a box car and a gondola empty and means that there were empties in there, and if they were in the road we would have to remove them. These two cars were in the road; we had to put the loaded cars in. I went in to see whether they were any empties there and told the boys to cut off the engine.

Testimony of Eugene Bender, on behalf of the defendant:

I am a yard clerk for the Pennsylvania Company at Fort Wayne; worked for that company in various capacities for fifteen years. As yard clerk I looked after the switching of cars in the freight department, and have the supervision of taking empty cars off of the sidings and put loaded cars in. When we have occasion to have empty cars taken off the sidings, we make a switch card for the yard master. Exhibit "E" is the kind of a card that is issued; that is given to the yardmaster and then to the particular conductor that does the work. Switch card, marked Exhibit "E," shows "St. L. & S. F. 123040, box, empty," and that it was in the Olds New House, and shows to the conductor that the car is to come out of the house. When the conductor and the switch crew get the card, they take the cars out of the house. The next entry on the card

shows some loaded cars and means that there are two cars on Toledo Street to be placed in the Olds Company house. The card also shows at what bins the cars are to be spotted. The first car was to be placed at bin No. 23 and the second car at bin No. 27. I am acquainted with the location of the bins with reference to the coal house. Bin No. 23 is the third bin from the north end; that would be the north of the center of the house and I should judge about 150 feet from the place where you enter the shed from the sidewalk. The siding track in the coal shed will hold about seven cars and must be nearly three hundred feet long. Beyond bin number 27 there is room for four cars. There was plenty of room to shove those empty cars back and spot these loaded cars. We would have to move the empty cars in order to spot the loaded cars at bins 23 and 27.

(We have omitted printing exhibits herein, believing it unnecessary, but have printed herein all the evidence in the transcript.)

THE CHARGE TO THE JURY.

(We print herein that portion of the court's charge to the jury bearing upon the single question of law involved in this cause: Was the question whether or not plaintiff was engaged in interstate commerce when he received his injuries properly left to the determination of the jury?)

The court, in charging the jury, in part, said:

"One of the issues tendered by the complaint and the answer is whether or not the plaintiff at the time he received the injuries complained of, was employed in interstate commerce. Upon this issue the plaintiff has the burden of proof. In other words, the complaint, as you will remember, alleges that at the time the plaintiff received the injuries complained of, he was engaged

in interstate commerce. The particular issue which you are to decide revolves around these two propositions; that plaintiff insists that the facts are that he was sent down there with two cars loaded with interstate freight; that in order to deliver these cars loaded with interstate freight at the place where he was instructed to deliver them, it was necessary to remove two unloaded cars and that the removal of these unloaded cars was one of the necessary incidents of the moving of the interstate freight, and that the thing that he was doing at the time he received the injuries with regard to these two cars was under those circumstances such as to engage him in interstate commerce. The defendant insists that the two loaded cars, being interstate commerce, the delivery of them was independent and separate from the removal of the two empty cars. If at the time he received his injuries he was engaged in moving interstate commerce, then one rule with regard to contributory negligence applies; if he was not engaged in interstate commerce at the time he received his injuries, another rule applies. It is left to you to decide whether or not at the time he received his injuries he was engaged in interstate commerce. If you find that he was not engaged in interstate commerce at the time he received the injuries complained of, and if you further find that he was guilty himself of negligence which contributed to his injuries, then the plaintiff cannot recover, because in that sort of a case contributory negligence is a complete bar. But if you find that the plaintiff at the time he received his injuries he himself was guilty of negligence which contributed to his injuries, then this contributory negligence is not a bar to his recovery but only affects the measure of damages, as I shall instruct you. * * *

As I have said, you are the exclusive judges of the facts. It is not for me to tell you what the facts are, and if I express any opinion to you as to what the facts are in this case, it is intended to enlighten your minds and not to bind your consciences. You are at liberty to disregard any statement I may make to you with regard to what the facts are, but I deem it my duty to state to you

that I think the evidence in this case establishes the fact that the railroad company failed to do its duty. I also think that the evidence clearly establishes the fact that the plaintiff was guilty of contributory negligence. I leave it to you to decide, without any intimation of my opinion, whether or not the plaintiff was engaged in interstate commerce at the time he received the injuries. As I have said, if upon all the facts and instructions I have given you, you find that the plaintiff was engaged in interstate commerce, then you should award him a verdict on a rule which I shall give you, diminishing the amount of damages by the proportion of his own negligence in the matter. If you find that he was not engaged in interstate commerce, there can be no recovery."

On June 11, 1914, the jury returned the following verdict:

"We, the jury, find for the plaintiff, and assess his damages at $11,250.00. W. S. Brandenburg, Foreman."

The court entered the folloiwng judgment:

"It is therefore considered and adjudged by the court that the plaintiff have and recover from the defendant the sum of $11,250.00, together with his costs and charges."

The defendant moved for a new trial on the ground that the verdict was contrary to law; that the verdict was contrary to the evidence; that the verdict is not sustained by sufficient evidence; that the damages assessed by the jury are execessive.

The court overruled the motion for a new trial and the case was carried to the United States Circuit Court of Ap-

peals for the Seventh Circuit upon the following assignment of error:

> "The court erred in refusing to give to the jury, at the request of the defendant, the following instruction:
>
> "I instruct you that the evidence in this case discloses that at the time he received the injuries complained of the plaintiff was not engaged in interstate commerce and he cannot, therefore, recover in this action, and your verdict should be for the defendant."
>
> Wherefore, the defendant prays that the judgment of the District Court may be reversed."

JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

The United States Circuit Court of Appeals for the Seventh Circuit entered the following judgment on May 19, 1915:

Pennsylvania Company
v.
Marion Donat.

> "Now this day come the parties by their counsel, and this cause now come on to be heard on the printed record and briefs of counsel, and an oral argument by F. E. Zollars, counsel for plaintiff in error, counsel for defendant in error present submitting on briefs.
>
> On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs."

The case is now in this court upon a writ of error to the United States Circuit Court of Appeals for the Seventh Circuit.

ASSIGNMENT OF ERRORS.

"Now comes the plaintiff in error, the Pennsylvania Company, and says that in the record and proceedings of the United States Circuit Court of Appeals for the Seventh Circuit in the above-entitled cause, and in the rendition of the final judgment therein, manifest error was intervened to the prejudice of the plaintiff in error, in this, to wit:—

First. Said Circuit Court of Appeals erred in entering judgment, affirming the judgment of the District Court of the United States for the District of Indiana, for $11,250.00, and cost of suit, entered on the 19th day of May, 1915, in favor of the defendant in error.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court for the District of Indiana, aforesaid, and in not remanding this cause to the said District Court for a new trial.

Third. Said Court of Appeals erred in not sustaining the first assignment of error upon the record in said cause.

Fourth. Said Circuit Court of Appeals erred in affirming the judgment of said United States District Court for the District of Indiana, and in not sustaining the first assignment of error upon the record in said cause.

Fifth. Said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error and in favor of the defendant in error, for costs in said Circuit Court of Appeals."

"The first assignment of error upon the record," as it is referred to in the assignment of errors to the United States Circuit Court of Appeals, was the only one which the plaintiff in error filed with his petition in error to the United States District Court, and it relates to the refusal of the court to instruct the jury to return a verdict in favor of the

defendant company on the ground that the plaintiff was not engaged in interstate commerce when he was injured.

ARGUMENT.

THE DISTRICT COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY, AS REQUESTED BY DEFENDANT, THAT THE EVIDENCE IN THIS CASE DISCLOSES THAT AT THE TIME PLAINTIFF RECEIVED THE INJURY HE WAS NOT ENGAGED IN INTERSTATE COMMERCE, THAT HE CANNOT, THEREFORE, RECOVER IN THIS ACTION, AND THAT THEIR VERDICT SHOULD BE FOR THE DEFENDANT. THE JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED.

The contention of the plaintiff in error that the court erred in refusing to instruct the jury that the plaintiff was not engaged in interstate commerce at the time he was injured is the only question of law involved in this case, and the contention is so clearly devoid of merit, in view of the evidence adduced at the trial and the learned charge of the court to the jury, that its refutation by argument is, we believe, hardly necessary. In fact, there was little evidence, if any, which even indirectly tended to show that the plaintiff was not engaged in interstate commerce when he was injured, and the court was entirely fair with the defendant when he allowed the jury to decide the question.

It is not disputed, in this action, that the loaded cars had come from outside the State of Indiana, and were to be delivered into the plant of the Olds Coal Company in Fort Wayne, Indiana; it was clearly a movement of interstate character. It is not disputed that at least one of the empty cars, which were standing over the pit and which blocked the way for delivery of said loaded cars, had also come from

outside of the State of Indiana. It is not disputed that Conductor Donat had charge of the work at the time he was injured, and that as conductor it was his duty to take the record of empty cars whenever it becomes necessary to move them. He had to take the numbers of these cars before he moved them, and he had to move them in order to deliver the loaded interstate cars to their final point of destination at bins number 23 and number 27. Therefore, it is perfectly clear that the work at which he was employed at the time he was injured was work necessarily incident to the completion of his interstate task, in other words, while performing such work he was engaged in interstate commerce.

We deem it unnecessary to call to the court's attention the many authorities, which we could readily cite, to establish our contentions. Recent decisions of this court, we contend, govern the decision of the question involved in the case at bar.

In New York Central & Hudson River R. Co. v. Carr, 35 Supreme Court Reporter, 780, decided June 14, 1915, Mr. Justice Lamar, delivering the opinion of the court, said:

> "Carr was a brakeman on a 'pick-up' freight train running from Rochester to Lockport over the lines of the New York Central. On November 18, 1910, some of the cars in this train contained interstate freight. Among those engaged in purely intrastate business were the two cars, at the head of the train and next to the engine, which were to be left at North Tonawanda, New York. On arriving at that point they were uncoupled from the train, pulled by the engine down the track, and then backed into a siding. It was the duty of one brakeman (O'Brien) to uncouple the air hose from the engine, and for the other (Carr) to set the hand brakes in order to prevent the two cars from rolling down upon the main track. O'Brien, having failed to open the gauge to the stop-cock, suddenly and negli-

gently 'broke' the air hose. The result was that the sudden escape of air—applied only in cases of emergency—violently turned the wheel handle attached to the brake which Carr at the time was attempting to set. The wrench threw Carr to the ground. * * *

The railroad company insists that when the two cars were cut off the train and backed into a siding, they lost their interstate character, so that Carr, while working thereon, was engaged in intrastate commerce and not entitled to recover under the Federal employers' liability act. The scope of that statute is so broad as to cover a vast field about which there can be no discussion. But owing to the fact that, during the same day, railroad employees often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the state from the interstate business. The present case is an instance of that kind; and many arguments have been advanced by the railway company to support its contention that, as the two cars had been cut off the interstate train and put upon a siding, it could not be said that one working thereon was employed in interstate commerce. But the matter is not to be decided by considering the physical position of the employee at the moment of the injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the Federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. St. Louis S. F. & T. R. Co. v. Seale, 229 U. S., 156; North Carolina R. Co. v. Zachary, 232 U. S., 248. This case is within the principle of those two decisions.

The plaintiff was a brakeman on an interstate train. As such, it was part of his duty to assist in the switching, backing, and uncoupling of the two cars so that they might be left on a siding in order that the interstate train might proceed on its journey. In performing this duty it was necessary to set the brake of the car still attached to the interstate train, so that, when

uncoupled, the latter might return to the interstate train and proceed with it, with Carr and the other interstate employees, on its interstate journey.

The case is entirely different from that of Illinois C. R. Co. v. Behrens, 233 U. S., 473, for there the train of empty cars was running between two points in the same state. The fact that they might soon thereafter be used in interstate commerce did not affect their intrastate status at the time of the injury, for, if the fact that a car had been recently engaged in interstate commerce, or was expected soon to be used in such commerce, brought them within the class of interstate vehicles, the effect would be to give every car on the line that character. Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to for a part or a necessary incident thereof. Under these principles the plaintiff is to be treated as having been employed in interstate commerce at the time of his injury, and the judgment in his favor must be affirmed."

In the case of St. Louis, S. F. & T. Rwy. Co. v. Seale, 229 U. S., 156, 162, the Supreme Court held that a yard clerk, while proceeding through the railway yards to meet an incoming interstate train for the purpose of taking down the numbers and initials on the cars, of inspecting and making a record of the seals on the car doors, of checking the cars with a conductor's list, and of labeling them to guide the switching crews, was employed in interstate commerce within the meaning of the employers' liability act of April 22, 1908, although the yard may be a terminal for that particular train, and none of the cars were going beyond.

Mr. Justice Van Devanter, delivering the opinion of the court, said:

"In our opinion the evidence does not admit of any other view than that the case made by it was within the Federal statute. The train from Oklahoma was not only an interstate train, but was engaged in the movement of interstate freight; and the duty which the deceased was performing was connected with that movement, not indirectly and remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to joints beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains, or for unloading or delivering freight, and this was as such a part of the interstate transportation as was the movement across the state line. McNeil v. Southern Railway Co., 202 U. S., 543; Johnson v. Southern Pacific Co., 196 U. S., 1, 21."

In North Carolina Rwy. Co. v. Zachary, 232 U. S., 248, Mr. Justice Pitney, delivering the opinion of the court, said:

"The evidence tended to show that train No. 72 of the Southern Railway Company had come into Selma, North Carolina, from Pinners Point, Virginia, and other places, and that a shifting crew was working this train so as to take two cars from it and put them into a train that was to include these and other cars to be hauled from Selma to Spencer, North Carolina, by engine No. 862, and that deceased was employed on this engine as fireman for the trip that was about to begin, and had already prepared his engine for that purpose. It is contended that the evidence failed to show that the two cars thus taken from train No. 72 had come in from Virginia, rather than from the other places, which it is said might be immediate North Carolina points. We find, however, evidence that the train which was to be hauled from Selma to Spencer by engine No. 862 was being made up in part from

cars that had come in from Pinners Point; and it was at least a reasonable inference that the two cars referred to were being put into the Spencer train in order to be carried forward as a part of a through movement of interstate commerce.

There seems to be no clear evidence as to the contents of these cars, and it is argued that, in the absence of evidence, it is as reasonable to infer that they were empty as that they were loaded; and that it was incumbent upon defendant to show that they contained interstate freight. We hardly deem it so probable that empty freight cars would be hauled from the Virginia point to Spencer. But were it so, the hauling of empty freight cars from one state to another is, in our opinion, interstate commerce within the meaning of the act. * * *

It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still *in futuro*. It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant. See Pederson v. Delaware L. & W. R. Co., 229 U. S., 146; St. Louis S. F. & T. R. Co., v. Seale, 229 U. S., 156.

Again, it is said that because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate that the boarding house was his destination, it nevertheless also appears that the deceased was shortly to depart upon his run, having just prepared his engine for that purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent to his duty to his employer. It seems to us clear that the man was

still on duty and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See Missouri K. & T. R. Co. v. United States, 232 U. S., 112.

We conclude that, with respect to the facts necessary to bring the case within the Federal act, there was evidence that at least was sufficient to go to the jury. It is doubtful whether there was substantial contradiction respecting any of these facts, but this we need not consider."

The court fully safeguarded the rights of the defendant in submitting to the jury the question whether or not the plaintiff was engaged in interstate commerce when he received his injuries. We believe that the court, from the evidence adduced at the trial, might have very properly decided as a matter of law against the defendant company. We contend that the finding of the jury in this action was conclusive; that the United States Circuit Court of Appeals rightly affirmed the judgment of the United States District Court; and that under the decisions of this court, in the absence of clear conviction of error, the judgment of the Circuit Court of Appeals should be affirmed.

In Seaboard Air Line v. Moore, 228 U. S., 433, the court held that where the record shows that there was evidence that the cars on which the accident occurred and which were being transferred by a switching engine were loaded with merchandise destined for a port to be there transferred to destination in another state, and the court instructs the jury that the plaintiff can only recover under the employers' liability act of 1908 in case it finds that he was engaged in interstate commerce, the Supreme Court will not, in the absence of clear conviction of error, disturb the judgment based on the verdict. Chief Justice White, delivering the opinion of the court, said:

"Coming to consider the errors alleged to have been committed in sustaining refusals of the trial court to give requested instructions, we content ourselves with saying, after an adequate examination of the record, and in the light of the various bills of exceptions therein set forth, containing the substance and effect of the evidence, that we think the charge as given by the trial court fully and correctly stated the applicable law. 'As we find nothing giving rise to a clear conviction on our part that error has resulted from the actions of the courts below,' the judgment of the Circuit Court of Appeals must be affirmed. Chicago Junction R. Co. v. King, 222 U. S., 222."

CONCLUSION.

Defendant in error herein respectfully submits that the question of law involved in this cause requires no further argument, and that, therefore, the writ of error should be dismissed, or the judgment of the United States Circuit Court of Appeals affirmed, or, as we have moved, with an abundance of caution, that the case be transferred to the summary docket.

Respectfully submitted,
SKILES, SKILES & SKILES,
HARPER & FUELBER,
NEWCOMB, NEWCOMB & CHAPMAN,
Attorneys for Defendant in Error.

RUFUS S. DAY, and
SAMUEL HERRICK,
Attorneys of Record
for Defendant in Error.

2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 564.

PENNSYLVANIA COMPANY, PLAINTIFF IN ERROR,

vs.

MARION DONAT, DEFENDANT IN ERROR.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM OR TRANSFER TO SUMMARY DOCKET.

ELMER E. LEONARD,
JAMES H. ROSE,
FRED E. ZOLLARS,
Counsel for Plaintiff in Error.

FREDERICK D. MCKENNEY,
SAMUEL O. PICKENS,
Attorneys of Record.

INDEX.

AUTHORITIES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 564.

PENNSYLVANIA COMPANY, PLAINTIFF IN ERROR,

vs.

MARION DONAT, DEFENDANT IN ERROR.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY TO MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR OR TO AFFIRM JUDGMENT OR TO TRANSFER TO THE SUMMARY DOCKET.

The defendant in error, Marion Donat, has moved this Honorable Court to dismiss the writ of error, or to affirm the judgment, or to transfer the cause to the summary docket, for the following reasons, to-wit:

> "*First.* To dismiss the writ of error herein on the ground that the question upon which the decision in this cause depends is so frivolous as not to need further argument, having been repeatedly decided by this court contrary to the contentions of the plaintiff in error; and that the petition for writ of error was filed in this case for purpose of delay.
>
> *Second.* To affirm the judgment of the United States Circuit Court of Appeals on the ground that the ques-

tion upon which the decision in this cause depends is so frivolous as not to need further argument.

Third. To transfer this cause for hearing to the summary docket, if this court should decline to dismiss or affirm, because the case is of such a character as not to justify extended argument."

The plaintiff in error respectfully shows to this Honorable Court, that the above and foregoing reasons are not sufficient.

First. For the reason that at the time of the injury to the defendant in error, he was engaged in intrastate commerce.

Second. For the reason that the question upon which the decision in this cause depends, is not frivolous and the petition for the writ of error was not filed for the purpose of delay.

Third. That the judgment of the Circuit Court of Appeals should be reversed upon the ground that the defendant in error was engaged in intrastate commerce at the time the injury occurred.

BRIEF IN OPPOSITION TO THE MOTION.

This action was commenced by the defendant in error, Marion Donat, in the United States District Court, for the District of Indiana, and was an action to recover damages for personal injuries received by the defendant in error while in the employ of the plaintiff in error, in the capacity of a yard conductor. The action was based on the Employers' Liability Act of April 22, 1908. (35 Stat. at L., 65, Chap. 149; U. S. Comp. Stats. Supp., 1911, P. 1322.)

The complaint, in the United States District Court, was in two paragraphs, the first of which was withdrawn and the action tried upon the second paragraph alone. The jury returned a verdict in favor of the defendant in error, in the sum of Eleven Thousand Two Hundred and Fifty Dollars. Judgment was rendered accordingly, and motion for a new trial by plaintiff in error was overruled, and a writ of error was sued out and the case taken to the United States Circuit Court of Appeals for the Seventh Circuit, which court, on May 17, 1915, affirmed the judgment of the lower court; the case is in this Court on writ of error to the United States Circuit Court of Appeals for the Seventh Circuit, issued June 17, 1915. (The transcript of record in this case has been filed in this Court and reference thereto made in this brief.)

THE COMPLAINT.

The complaint charges in substances as follows:

> "That the plaintiff in error was a resident of the State of Pennsylvania, and owned and operated an interstate railroad from the City of Philadelphia, in the State of Pennsylvania, through the State of Ohio, and through the City of Fort Wayne, in the State of Indiana, to the City of Chicago, in the State of Illinois. That in the City of Fort Wayne it had numerous sidetracks and switch tracks on its right-of-way and on the premises and in places of business of persons and corporations, to whom it delivered freight in carload lots; that the Olds Coal Company was located in said City and engaged in

business as dealers in coal; that the plaintiff in error owned and controlled a switch track, extending into the coal house of the coal company and used for the purpose of delivering coal consigned to said company, in carload lots; that in said coal house and under said switch track, there was a chute or unloading pit, over which gondola cars and other cars were placed for unloading; that the plaintiff in error failed to place any barriers, guard rails or lights near or around said pit, to prevent its employees from falling therein, while placing and switching cars upon said track; that on the 19th day of March, 1913, the defendant in error was employed as a yard conductor, in charge of a switch crew; that on said day, at about eleven o'clock P. M., he was directed by his superior officer to deliver certain interstate cars, loaded with coal, to said coal company, and to place them on said switch track; that in order to deliver said cars upon said switch track, in said coal house, it was necessary for the defendant in error to remove two empty freight cars, then and there standing upon said track, which had been used in interstate commerce, in the shipment and delivery of coal to said coal company; that it became and was the duty of the defendant in error to superintend the removal of said empty cars, and that in the discharge of that duty he walked along a passage way or space between said empty freight cars, on said switch track in said coal house, and fell into said unguarded pit, severely and permanently injured him, for which injuries he demanded Fifty Thousand ($50,000.00) Dollars. (Record, pp. 7-11.)

THE EVIDENCE.

My name is Noble J. Olds. I live in Fort Wayne, Indiana. I am engaged in the coal business. I am secretary and treasurer of the Olds Coal Company, whose plant is located on Wallace street; the coal yard extends north from Wallace street to Murray street, a distance of three hundred feet; the coal house is of modern construction and built with an overhead or porch, and coal bins underneath on the west side, and is about three hundred feet in length and fifty-seven feet in width. The Pennsylvania Company has a siding on Murray street and we tap that siding for our private switch track. The switch track

comes in on the east side of the building and goes to the bins. The bins have lift buckets from which we load the wagons.

The picture marked "Exhibit A," (See R. page 29) shows the exterior of the building on the north side and shows the entrance of the switch into the building. The Pennsylvania Company constructed this switch, and it extends the full length of the building, about three hundred feet. Cars are run in and on that switch for the purpose of unloading. The picture marked "Exhibit A" represents a car just entering the switch track from Murray street and is used by the Pennsylvania Company in putting cars into our coal house. There is a space of about two and one-half or three feet between the side of a freight car when it is placed on our switch track, and the side of the building to the west. On the east side there is about the same space. At a point 160 or 170 feet, or a little over half way from the entrance to the coal house, there is a pit; this pit extends clear under the switch track and is about fifteen feet wide, east and west, and about fifteen feet long, north and south; it is built on an incline under the car, so that it shoots the coal over to the west side where the pit becomes deeper, and where we run our buckets down into it to gather up the coal. The picture marked "Exhibit B," (See page 30) shows the side of the pit with a car standing over it. At the point between the car that stands over the pit as shown in the picture marked "Exhibit B," and the side of the building on the west, the pit is from seven to ten feet deep; it is nearer ten feet than seven feet; the middle is ten feet and the side is about seven feet. The pit is constructed throughout of concrete. I remember that a man was hurt in there on March 19, 1913. At the time there was no light about the pit, nor any barriers placed anywhere about the pit or to keep anybody from walking into it. Ordinarily, you could see the outline of the pit, but on a dark night it would be obliterated. On the night of March 19, 1913, there were cars standing on the switch track.

On cross examination.

I have no record of the cars that were on the siding except the demurrage record furnished by the Pennsylvania Company. I took the numbers of these particular cars

from that record. The only thing that I know about these particular cars being on the track at that time is from the record furnished by the Pennsylvania Company. The record shows when the cars were placed and when they were released.

Re-direct Examination:

The entrance of the shed, where the track enters our building, is about thirty-five or forty-five feet high. The Pennsylvania Company has been using that track to bring coal into our house, in the condition it was in on the 19th day of March, 1913, since we began to use the biulding on the 15th or 17th day of January, 1913.

Cross-examination:

The switch track from the sidewalk or curb was paid for by us. It is absolutely under our control and management. We absolutely own the track inside of our building and on our private grounds.

Re-direct examination:

The Pennsylvania Company would send their servants in there to take out empty cars and put loaded cars in at all times of the day, and night.

Re-cross examination:

The Pennsylvania Company, by special arrangement, switched the track only at night time.

Testimony of H. L. Bley, on behalf of the defendant in error:

My name is H. L. Bley. I live at No. 2803 Hanna Street, Fort Wayne, Indiana. I am general yardmaster of the Pennsylvania Company, having been so for about fourteen years. As yardmaster I keep a record of the arrival and departure of all freight cars. I remember the occasion of a man being injured at the Olds Coal Company, sometime in March. I have a record of the cars loaded with coal for the Olds Coal Company, on

or about March 19, 1913. This record is kept in card form as we keep no book record in the yard office. The record shows that St. L. & S. F. car 123040 was received from the Wabash Railroad Company for the Olds Coal Company and is receipted for by Conductor E. H. Repine. After the car came into our possession it went from the Wabash transfer to track number one,—what we call the Toledo Street track. The next I got it is it coming out of the Olds Coal Company on March 19, empty, and the receipt signed by Mr. Donat; the receipt shows that it came out of the Olds Coal Company on March 19th; it was brought out by Conductor Donat empty. I do not know where the cars originally came from, but the Pennsylvania Company got the car on March 19th. Car K. & M. 6689, arrived from Ridgeville, Indiana, March 16, 1913, loaded with coal for the Olds Coal Company. I have no record of its delivery, but I have a record of its coming out of there on March 19th, and the record is signed by Mr. Donat. Car No. 298403, P. R. R. arrived on March 18th from Lima, Ohio, over the Pennsylvania Road, and went into the Olds Coal Company's plant, on March 19th and the record was signed by Conductor Donat. Car 40236, N. & W., arrived March 18th, from Suzanna mines, loaded with coal and was delivered to the Olds Coal Company on March 19th by Mr. Donat, conductor.

Testimony of E. H. Kirkland, on behalf of the defendant in error:

My name is E. H. Kirkland. I live at No. 134 Washington Bouv. West, and am the freight agent for the Pennsylvania Company at Fort Wayne, Indiana. I have been holding that position since December 1, 1899. I keep the records of the shipping point or points from where freight cars are shipped. Car number 123040, St. L. & S. F. was received from the Wabash Railroad at Fort Wayne, loaded with coal for the Olds Coal Company. I do not know what the shipping point was; the record does not show. Car K. & M., 6689, loaded with coal, arrived March 16, 1913, from Marting, West Virginia, consigned to the Olds Coal Company. I do not

know whether it was delivered to the Olds Coal Company or not. Car number 298403, P. R. R., loaded with coal, was shipped from Minnehaha mines, Ohio. I do not know whether it arrived on March the 18th, 1913, or not. The shipment originated on another road and reached the P. F. W. & C. Ry. at Bucyrus, Ohio, and was consigned to the Olds Coal Company. Car 40236, N. & W., on March 18, 1913, was loaded with coal, at Suzanna, West Virginia, was delivered to the Olds Coal Company. I do not know the date of delivery.

Testimony of G. W. Johnson, on behalf of the defendant in error:

My name is G. W. Johnson. I live at Huntertown, Allen County, Indiana. For the last two years and three monthsI have been employed by the Pennsylvania Company as a brakeman and was so employed on the 19th day of March, 1913. I was brakeman in the Fort Wayne yards and worked from 12 o'clock noon to 12 o'clock night. My conductor was Marion Donat; I was a member of his crew. I remember of taking some cars of coal over to the Olds Coal Company on that night; it was dark. We came in there from the east and cut off our cars on the track and went in to take out the empties. I rode on the pilot of the engine; when I coupled onto the car over the coal pit it was very dark in there and there were no lights. I heard the conductor groan and walked up close enough to the pit, with my lantern, to throw the light in, and found him lying face downward in the bottom of the pit; he was unconscious. There were no lights or barriers around the pit anywhere; no coal in pit; only coal dust and a little water.

On cross-examination witness testified:

The pit is about one car length from the door of the building where we entered. The empty cars were on the track in the building; I think there were two of them. The pit is built deeper at some places than others. The bottom was on an incline of forty-five degrees; the side of the pit was about seven and one-half or eight feet deep,

and the bottom of it, I should judge, nine or nine and one-half feet deep. We came in there from the east and cut off our cars on the track and went in to take out the empties.

Testimony of C. W. Comparet, on behalf of the defendant in error:

My name is C. W. Comparet. I live at number 117 Elmwood street, Fort Wayne, Indiana. My business is that of yard brakeman for the Pennsylvania Company. I have been employed in that capacity for about two years, in October. Mr. Donat was my conductor. I recall the time that Donat was injured at the Olds Coal Company. We got two cars of coal on Toledo street to take over to the Olds Coal Company. I was with the crew when they arrived at the Olds Coal Company's plant, or yards; I stayed outside of the building until the engineer came out and said that the conductor had fallen into the pit. I went into the building in about three minutes after the engineer told me. There were no lights or barriers about the pit. Donat was down in the pit when I went in. Mr. Donat went into the biulding first and they followed him with the engine.

On cross-examination witness testified:

The engine was just west of the building when Donat went in. The conductor usually finds out what work he is to do. He precedes the rest of the crew to see what is to be done.

Testimony of Marion Donat, on behalf of the defendant in error:

My name is Marion Donat. I reside in the City of Fort Wayne. I am plaintiff in this case. I worked for the Pennsylvania Company pretty near eleven years. I was extra yard conductor on the night of March 19, 1913,—

the night I got hurt. On that night I had two cars of coal to deliver at the plant of the Olds Coal Company. I had never been in the place before. When we arrived at the Olds Coal Company's plant there were two empty cars on the Olds Coal Company's tracks. We had to take out the empties before we could put in the loaded cars; we had to put the loaded cars on the same track where the empties were. As conductor it was my duty to take the record of the empty cars. When we arrived at the Olds Coal Company's plent we cut the two loaded cars off the engine and let them stand on the track on Murray street, and came in with the empty engine to take the two empty cars out. At the time I got hurt I was taking the number of the empty cars. I had my lantern on my left arm and had a card with the numbers of the empty cars in my hand. I take the numbers of all empty cars that are taken out of switch tracks and turn them over to the yard office so that they know where these empty cars are. While I was taking the numbers I fell into the hole. I do not remember what happened afterwards.

On cross-examination witness testified:

We do not take the empties out unless we have other cars to put in. Sometimes we take the empties out if there is a special order. The night of the accident we had two loaded coal cars and we took them over to the Olds Coal Company. In order to get to the Olds Coal Company from the Pennsylvania Company, we had to cross the Wabash tracks and go down two streets. We ran the cars down the center of Lafayette street into Murray street, and then turned west on Murray street. As we came down Murray street we had two cars ahead of the engine. The engine being headed east and backing west. When we got down pretty close to the coal switch that goes into the Olds Coal Company's plant, we cut off the engine, leaving the two loaded cars stand east of the switch, so that we could go in and get the empties and pull them out. We stopped east of the Coal Company's switch, uncoupled the engine and then ran the engine further west on the Murray street track. I went into the Coal Company's shed to look at the empty cars and take the numbers. In doing so, I walked along a pathway between the

building and the cars. I got the number of the first car, but not the second car when I fell into the hole.

Testimony of H. L. Bley, on behalf of the plaintiff in error:

My name is H. L. Bley. I am yard master for the Pennsylvania Company. At the time Donat was injured there was a card furnished by the agent to the assistant yard master, at Lafayette street, for two empty cars to come out of the Olds Coal Company's plant; two loaded cars were located at the time on Toledo street which were to be placed in the Coal Company's house. The Coal Company's house would hold five or six cars, maybe more. Exhibit "E" is a card furnished the assistant yard master and was evidently given to Mr. Donat on the night of the accident. When the conductor receives the card and executes the order, he signs the card and turns it into the yard office. I cannot tell whether this is the card which was given to Donat, or not. It has Donat's name on it. (It was admitted by both parties that Exhibit "E" is the card issued to Marion Donat, on which he moved the cars in question.)

On cross examination the witness testified as follows:

I think it was necessary in order to place the two loaded cars on the Olds Coal Company's tracks, that they had to take out the two cars that were in on that track.

On re-direct examination the witness testified:

I do not know how many cars were in on that track that night. The loaded cars could have been put in there without taking the two empty cars out, but they were ordered to take out those two cars.

On re-cross examination the witness testified:

The cars were to be delivered at certain bins. It would be necessary to remove the empty cars in order to set them.

On re-direct examination the witness testified:

The reason we took the empty cars out was because they were ordered off the track. They were to be brought out and disposed of. We ordered them taken out because we wanted to take them away.

On re-cross examination the witness testified:

It was necessary in order to put the other cars in there.

———

39. Testimony of C. W. Comparet, on behalf of the plaintiff in error:

I am the same Mr. Comparet who was on the witness stand yesterday. I was one of the brakemen of the crew that moved the cars on the night of the accident. The track at the Olds Coal Company would ordinarily hold seven cars. If there is a hopper or two among the cars it would hold eight cars. There are different bins along the Olds Coal Company tracks; we spot the cars at the bins and the order shows where to spot them. If they would have to be spotted at the pit we would have to take out the empty cars. We were ordered to spot these cars at a particular place. I do not remember just where. The only necessity for getting the empty cars out was to make room for the two loaded cars. There was enough room without taking the empty cars out. The orders received from the Company showed where to spot these cars.

———

Testimony of Marion Donat, witness recalled on behalf of plaintiff in error.

I do not think I had orders to take the two empty cars out. We had to take them cars out. We do not take the empty cars out unless we had loads to go in. I do not think that is my signature on the card marked Exhibit "E." I had a card something similar to that. I had no particular order for these two cars, but it was our duty, if they were in the way, to take them out. I

do not think I removed the cars by reason of any order. I got the card that night over at the "Puzzle Switch" shanty. The first two items, as shown on the card
40 marked Exhibit "E," means a box car and a gondola empty and means that there were empties in there, and if they were in the road we would have to remove them. These two cars were in the road; we had to put the loaded cars in. I went in to see whether there were any empties there and told the boys to cut off the engine.

Testimony of Eugene Bender, on behalf of plaintiff in error:

My name is Eugene Bender. I am a yard clerk for the Pennsylvania Company, at Fort Wayne; worked for that company in various capacities for fifteen years. As yard clerk I looked after the switching of cars in the freight department, and have the supervision of taking empty cars off of the sidings and put loaded cars in. When we have occasion to have empty cars taken off the sidings, we make a switch card for the yard master. Exhibit "E" is the kind of a card that is issued; that is given to the yardmaster and then to the particular conductor that does the work. Switch card, marked Exhibit "E," shows "St. L. & S. F. 123040, box, empty" and that it was in the Olds New House, and shows to the conductor that the car is to come out of the house. When the conductor and the switch crew get the card, they take the cars out of the house. The next entry on the card shows some loaded cars and it means that there are two cars on Toledo street to be placed in the Olds Company house. The card also shows at what bins the cars are to be spotted. The first car was to be placed at bin No. 23 and the second car at bin number 27. I am acquainted with the location of the bins with reference to the entrance to the coal house. Bin number 23 is the third bin from the north end; that would be the third bin from where you go in. Bin number 27 is north of the center of the house and
41 I would judge about 150 feet from the place where you enter the shed from the sidewalk. The siding track in the coal shed will hold about seven cars and must be nearly three hundred feet long. Beyond bin number

27 there is room for four cars. There was plenty of room to shove those empty cars back and spot these loaded cars. We would have to move the empty cars in order to spot the loaded cars at bins 23 and 27.

THE CHARGE TO THE JURY.

We set out the instruction tendered by the plaintiff in error to the District Court, which involves the single question of law in this case; which instruction is as follows:

> "I instruct you that the evidence in this case discloses that at the time he received the injuries complained of, the plaintiff was not engaged in Interstate Commerce, and he cannot, therefore, recover in this action, and your verdict should be for the defendant."

On June 11, 1914, the jury returned the following verdict:

> "We, the Jury, find for the plaintiff, and assess his damages at $11,250.00.
>
> "W. S. Brandenburg, Foreman."

The court entered the following judgment:

> "It is therefore considered and adjudged by the court that the plaintiff have and recover from the defendant the sum of $11,250.00, together with his costs and charges."

The plaintiff in error moved for a new trial on the ground that the verdict was contrary to law; that the verdict was contrary to the evidence; that the verdict is not sustained by sufficient evidence; that the damages assessed by the jury are excessive.

The court overruled the motion for a new trial and the case

was carried to the United States Circuit Court of Appeals for the Seventh Circuit, upon the following assignment of error:

> "The court erred in refusing to give to the jury, at the request of the defendant, the following instruction:"
> "I instruct you that the evidence in this case discloses that at the time he received the injuries complained of the plaintiff was not engaged in interstate commerce and he cannot, therefore, recover in this action, and your verdict should be for the defendant."

JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

The United States Circuit Court of Appeals for the Seventh Circuit entered the following judgment on May 19, 1915:

> "PENNSYLVANIA COMPANY
> VS.
> MARION DONAT."
>
> "Now this day come the parties by their counsel, and this cause now come on to be heard on the printed record and briefs of counsel, and an oral argument by F. E. Zollars, counsel for plaintiff in error, counsel for defendant in error present submitting on briefs."
> "On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs."

The case is now in this court upon a writ of error to the United States Circuit Court of Appeals for the Seventh Circuit.

ASSIGNMENT OF ERRORS.

"Now comes the plaintiff in error, the Pennsylvania Company, and says that in the record and proceedings of the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled cause, and in the rendition of the final judgment therein, manifest error was intervened to the prejudice of the plaintiff in rror, in this, to wit:"

"FIRST. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the District of Indiana, for $11,250.00, and costs of suit, entered on the 19th day of May, 1915, in favor of the defendant in error.

"SECOND. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court for the District of Indiana, aforesaid, and in not remanding this cause to the said District Court for a new trial.

"THIRD. Said Court of Appeals erred in not sustaining the first assignment of error upon the record in said cause.

"FOURTH. Said Circuit Court of Appeals erred in affirming the judgment of said United States District Court for the District of Indiana, and in not sustaining the first assignment of error upon the record in said cause.

"FIFTH. Said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error and in favor of the defendant in error, for costs in said Circuit Court of Appeals."

ARGUMENT.

THE DISTRICT COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY THE PLAINTIFF IN ERROR, "THAT THE EVIDENCE IN THIS CASE DISCLOSES THAT AT THE TIME HE RECEIVED THE INJURIES COMPLAINED OF, THE PLAINTIFF WAS NOT ENGAGED IN INTERSTATE COMMERCE AND HE CANNOT, THEREFORE, RECOVER IN THIS ACTION, AND YOUR VERDICT SHOULD BE FOR THE DEFENDANT." THE JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS SHOULD BE REVERSED.

In discussing the error committed we deem it essential that the character of the cars which the defendant in error was preparing to remove from the switch track of the Olds Coal Company, be first determined.

In the evidence of H. L. Bley, we find that a record of the

arrival and departure of all freight cars was kept in card form. The record shows that St. L. & S. F. car 123040 was received from the Wabash Railroad Company and was receipted for by Conductor E. H. Repine. The record next shows the car coming out of the Olds Coal Company, empty, and the receipt signed by M. Donat. (Record, p. 22.)

Car K. & M. 6689 arrived from Ridgeville, Ind., on March 16, 1913, loaded with coal for the Olds Coal Company, but no record of its delivery kept. The record shows that that car came out of the Olds Coal Company on March 19, 1913, and the card is signed by M. Donat. (Record, p. 22.)

The evidence of G. W. Johnson, on behalf of the defendant in error, is to the effect that he was employed on March 19, 1913, by the Pennsylvania Company as a yard brakeman and a member of Conductor Donat's crew, and remembers going to the plant of the Olds Coal Company to take out the empties. (Record, p. 23.) The empty cars were on the track in the building. (Record, p. 24.)

The evidence of Marion Donat, the defendant in error, is that when he arrived at the plant of the Olds Coal Company, there were two empty cars on their switch track; he had to take out the empties. (Record, p. 25.)

The evidence of H. L. Bley, a witness for the plaintiff in error, is to the effect that there was a card furnished the assistant yardmaster, at Lafayette Street, for two empty cars to come out of the Olds Coal Company's plant, and two loaded cars to be placed in the Coal Company's house; the reason for taking the empty cars out, was because they were ordered off the track. (Record, p. 26.)

Exhibit "E" shows record of two empty cars to be removed from the Olds Coal Company's plant. (Record, p. 27.)

The evidence of Marion Donat, on behalf of the plaintiff in error, shows that the first two items, on the card marked Exhibit "E," mean, a box car and gondola empty. (Record, p. 28.)

The evidence of Eugene Bender, witness on behalf of the plaintiff in error, is to the effect that he was yard clerk and

looked after the switching of cars in the freight department, and had the supervision of the taking of empty cars off the sidings; when empty cars were to be taken off the sidings, a switch card, such as Exhibit "E," would be made out and given to the conductor. Switch card, marked Exhibit "E," shows St. L. & S. F. car 123040, empty. (Record, p. 29.)

Clearly, these cars at the time of the accident to the defendant in error, were not engaged in interstate commerce, as they had arrived at their final destination, had been unloaded and were about to be moved to another part of the yard.

The rule, as laid down by the authorities, is to the effect that whenever a car is loaded in one State of the Union, with a commodity which is designed for another State, and begins to move, then interstate commerce has begun and does not cease till the car has arrived at its final point of destination.

United States vs. Western & A. R. Co., 184 Federal Reporter, 336;
Atchison T. & S. F. Ry. Co. vs. United States, (Circuit Court of Appeals, Seventh Circuit), 198 Federal Reporter, 637-639.

The fact that empty cars are to be transported to another portion of the railroad yard, does not clothe them with an interstate character. The evidence of Donat, the defendant in error, is to the effect that he took the numbers of all empty cars that were to be taken out of the switch tracks, and turned them over to the yard office, so that they would know where the empty cars were. (Record, p. 25.)

The testimony of H. L. Bley, on behalf of the defendant in error, is to the effect, that the reason they took empty cars out, was because they were ordered off the track; they were to be brought out and disposed of. They ordered them taken out because they wanted them away. (Record, p. 26.)

United States vs. New York Central & H. R. R. Co., 205 Federal Rep. 428.

In the above case, it is said:

> "Defendant railroad company used different yards at R., extending over six miles, all of which were under the control of a general yardmaster. It was necessary, in operating cars in the yard limits and in moving them from one yard to another, to switch onto branch tracks running into industrial yards adjacent to the switch tracks, where such cars were loaded or unloaded, and then hauled away and assembled preparatory to proceeding. A train of 39 empty freight cars, only 25 of which were equipped with air brakes, was transferred from one part of the yard to another, a distance of four miles, where the cars were classified and inspected. The transfer was made by a switch engine, and the cars were moved for about two miles from the starting point over switch tracks, and from that point for the remaining two miles over a through freight track, which was also used in moving cars in the yard. *Held* insufficient to show that the train was engaged in interstate commerce, and the railroad was therefore not liable for violating the Safety Appliance Act for failure to have the air brakes connected."

The only point in this case is: Was the defendant in error engaged in interstate or intrastate commerce, at the time he received his injury?

A brief resume of the evidence, given at the time of the trial, we do not think amiss.

The evidence of Noble Olds, given on behalf of the plaintiff in error, is to the effect that the Pennsylvania Company had a siding on Murray Street and that a private switch track tapped that siding and extended the full length of the Olds Coal Company's building, for a distance of about three hundred feet. (Record p. 18.)

The evidence of H. L. Bley, called on behalf of the defendant in error, shows that he was a yard master and that he kept a record of the arrival and departure of all freight cars, in card form, keeping no books in the office. (Record p. 22.)

The evidence of G. W. Johnson, called on behalf of the defendant in error, shows that he had been in the service of the Pennsylvania Company, as a brakeman, for two years

and three months and was so employed on the 19th day of March, 1913, and was a member of Conductor Donat's crew. He remembers taking some of the coal cars over to the Olds Coal Company on that night; that they came in from the east and cut off the loaded cars on the Murray Street track, and went into the Olds Coal Company's house to take out the empties. (Record, p. 23.)

The evidence of C. W. Comparet, called on behalf of the defendant in error, shows that he was one of the brakemen on the night the defendant in error was injured, and that they got two cars of coal on Toledo Street, to take over to the Olds Coal Company. (Record, p. 24.)

The evidence of Marion Donat, the defendant in error, is to the effect that he was extra yard conductor on the night of March 19, 1913; that, on that night, he had two cars of coal to deliver to the plant of the Olds Coal Company; when he arrived at the Olds Coal Company's plant, there were two empty cars on the track; he had to take out the empties before he could put in the loaded cars. As conductor it was his duty to take a record of the empty cars; when he arrived at the Olds Coal Company's plant, he cut the two loaded cars off the engine and let them stand on the track on Murray Street, and came in with the empty engine to take the empty cars out. At the time he was injured, he was taking the numbers of the empty cars; the numbers of all empty cars that are taken out of the switch tracks are turned over to the yard office, so that they know where the empty cars are.

On cross-examination the evidence of the defendant in error shows, that when they got down close to the switch that lead into the Olds Coal Company's plant, the engine was cut off, leaving the two loaded cars standing east of the switch, so that they could go in and get the empties and pull them out; they stopped east of the Coal Company's switch, uncoupled the engine and ran the engine further west on Murray Street; at that time the defendant in error went into the Coal Company's shed to look at the empty cars and take the numbers. (Record, pp 25-26.)

The evidence of H. L. Bley, called on behalf of the plaintiff in error, shows that at the time Donat was injured, there was a card furnished by the agent to the assistant yardmaster, at Lafayette Street, for two empty cars to come out of the Olds Coal Company's plant and two loaded cars, that were located at the time on Toledo Street, were to be placed in the Olds Coal Company's coal house. (Exhibit "E" represents the card furnished to Mr. Donat.) When the conductor receives the card and executes the order, he signs the card and turns it into the yard office.

On re-direct examination the witness testified, that the reason empty cars were taken out was because they were ordered off the track; they were to be brought out and disposed of. They were ordered taken out because we wanted to take them away. (Record, p. 26.)

The evidence of Eugene Bender, called on behalf of the plaintiff in error, is to the effect that he was the yard clerk for the Pennsylvania Company and looked after the switching of cars in the freight department, and had the supervision of the taking of empty cars off of sidings and putting loaded cars in; that when he had occasion to have empty cars taken off the sidings, he made a switch card for the yard master, such as is shown by Exhibit "E;" the card is given to the yardmaster and then to the particular conductor who does the work; switch card, marked Exhibit "E," shows St. L. & S. F. 123040, box, empty, and that it was in the Olds new house; it shows to the conductor that the car is to come out of the house. The next entry on the card shows some loaded cars, and it means that there are two cars on Toledo Street, to be placed in the Olds Coal Company house. The card also shows at what bins the cars are to be spotted; that the first car was to be placed at bin number 23 and the second car at bin number 27; bin number 23, is the third bin from where you go in; bin number 27 is north of the center of the house and would be about 150 feet from the place where you enter the shed from the sidewalk. The switch track in the coal shed will hold about seven cars and must be nearly

300 feet long; beyond bin number 27 there is room for four cars; there was plenty of room to shove those empty cars back and spot the loaded cars. (Record, p. 29.)

The recent case of the *Illinois Central R. Co. vs. Behrens*, decided on April 27, 1914, by the United States Supreme Court, reported in 233 U. S. 473, (58 Law. Ed. p. 1051), we think disposes of the entire question presented in this case.

In that case it was held that

> "A fireman employed by an interstate railway carrier on a switch engine, who was killed while aiding in the work of coupling several cars all loaded with intrastate freight between two points in the same city was not employed in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908, making every common carrier by railroad, while engaged in interstate commerce, liable to an employee suffering injury while he is employed by such carrier in such commerce, although upon a completion of that task the switch crew was to have gathered up and taken to other points several other cars as a step or link in both interstate and intrastate transporation."

In this case, the defendant in error, on the night of the injury, received an order from the yardmaster, in card form; the first two items of which required him to remove cars St. L. & S. F. 123040 and K. & M. number 6689, from the Olds new house (see Exhibit "E," Record, p. 27), and afterwards to put into the same house two loaded cars, located on a track on Toledo Street, and spot them at bins 23 and 27. Instead of following out the order, Conductor Donat, on his way to the Olds Coal Company, picked up the two loaded cars on Toledo Street, took them over on Murray Street and there cut them off from the engine, allowing them to stand on the street while he proceeded with the engine, in accordance with his orders, to remove the two empty cars.

It cannot, we think, be contended that the moving of the two empty cars was interstate commerce, as they were to be moved from the Olds Coal Company's track to some other track in the yards. The fact that the two loaded cars had

been picked up on Toledo Street and taken to Murray Street, and there cut off from the engine, does not, of itself, stamp the whole transaction as interstate, any more than if the cars had not been taken from Toledo Street, or had been allowed to remain in some other part of the yards, until the empties were removed. The two empty cars ordered removed from the Olds Coal Company's track and the placing of the two loaded cars on the track, thereafter, was in no sense dependent upon the removal of the empties. They were removd by virtue of the order given to the defendant in error, and not otherwise, as it was shown by the evidence that there was ample room for the placing of the two loaded cars upon the track, without the removal of the empties, and that they would not have been removed, except for the order. Therefore, we think that the contention that it was necessary to remove the empties before the loaded cars were placed, must be considered in the light of the order. The cutting off of the engine from the two loaded cars, on Murray Street, was a termination of the interstate movement of the cars, for the time being, as much so as if they had been moved onto another track, in some distant portion of the yard. Each transaction was separate and apart from the other, just as much so as the character of the cars handled, differed.

The case of the *New York Central & Hudson River Railroad Company* against *Bernard J. Carr*, reported in 35 Supreme Court Reporter, page 780, decided June 14, 1915, by Mr. Justice Lamar, and cited by the defendant in error, has no application in this case, for the reason that the two cars in question were a part of an interstate train, and were attached to an interstate engine, and the uncoupling and placing them on another track, was necessary in order that the train might proceed on its interstate journey. The court in that case said: "Each case must be decided in the light of the particular facts, with a view of determining whether at the time of the injury the employee is engaged in interstate business." So, in this case, the court will have to determine from the particular facts,

that question, as a matter of law. In this case the switching crew, of which the defendant in error was the conductor, had doubtless been engaged in both intrastate and interstate business prior to the injury. But, if in compliance with orders received in their general business, they were required to shift cars of intrastate character from one track to another, in the company's yards, and subsequently, under orders, did handle or move interstate cars, that fact would not characterize every transaction in which they were engaged, as interstate, nor would it be deemed to be, directly and immediately connected as to form a part or necessary incident thereto.

In the absence of an order to place two loaded cars upon the track, there can surely be no contention as to the character of the empties to be removed. Consequently, the employees, while so engaged, would be handling intrastate commerce only, and if an injury occurred to one of the crew while so engaged, there could be no recovery under the statute, even though, upon a completion of the task, they would be required to engage in another, which would have been a part of interstate commerce.

There was, at the time of the injury, no physical necessity for the removal of the empty cars. If there had been, an entirely different question would have been presented. The whole transaction involved only an ordinary switching process, covering the movement of cars of different characters, at different times, the movement of which was not dependent one upon the other. If the cars on Toledo Street, which were interstate in their character, had not been moved by the defendant in error, and he had proceeded to take the empty cars from the Olds Coal Company's track, and was injured while so doing, can it then be said, that he was engaged in interstate commerce, merely because he had an order and expected to place interstate cars thereon at some future time?

In the case of the *Illinois Central R. R. Co. vs. Behrens*, reported in 233 U. S. 473, (58 Law. Ed. p. 1051), the court, in the last paragraph of its decision sums up the case as follows:

"At the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another, which would have been a part of interstate commerce, is immaterial under the statute, *for by its terms the true test is the nature of the work being done at the time of the injury.*"

The plaintiff in error earnestly urges upon this Honorable Court, that the facts developed in this case clearly show that at the time of the injury to the defendant in error, he was not engaged in interstate commerce, and that the judgment of the Circuit Court of Appeals should be reversed and the motion of the defendant in error denied.

Respectfully submitted,

ELMER E. LEONARD,
JAMES H. ROSE,
FRED E. ZOLLARS,
Counsel for Plaintiff in Error.

FREDERICK D. MCKENNEY,
SAMEUL O. PICKENS,
Attorneys of Record.

PENNSYLVANIA COMPANY *v.* DONAT.

ERROR TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 564. Motion to dismiss or affirm submitted October 18, 1915.—Decided November 1, 1915.

In an action based on the Employers' Liability Act the trial court properly submitted to the jury for its determination whether on the facts shown in regard to movement of cars coming from without the State, the plaintiff was or was not engaged in interestate commerce and

properly refused to charge that he was not so engaged and therefore could not recover.

A writ of error to review such a judgment is so frivolous as not to need further argument and a motion to affirm must be granted under § 5 of Rule 6.

224 Fed. Rep. 1021, affirmed.

THE facts, which involve the duty of this court in the case of a frivolous appeal in a case under the Employers' Liability Act, are stated in the opinion.

Mr. Rufus S. Day, Mr. Samuel Herrick, Mr. R. B. Newcomb, Mr. James B. Harper, Mr. A. G. Newcomb, Mr. E. C. Chapman, Mr. George M. Skiles, Mr. Thomas J. Green, Mr. Roscoe C. Skiles and *Mr. Otto E. Fuelber,* for defendant in error in support of the motion.

Mr. Samuel O. Pickens, Mr. Frederic D. McKenney, Mr. Elmer E. Leonard, Mr. James H. Rose and *Mr. Fred E. Zollars* for plaintiff in error in opposition to the motion.

Memorandum opinion by MR. JUSTICE MCREYNOLDS, by direction of the court.

The question presented upon this writ of error is "so frivolous as not to need further argument," and the motion to affirm the judgment below must be granted. (Rule 6, § 5.)

Basing his claim upon the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, Marion Donat began the original action in the United States District Court for Indiana against the Pennsylvania Company, a carrier by railroad, to recover damages for personal injuries alleged to have been suffered by him while employed as a yard conductor. The trial court refused a request to charge that he was not engaged in interstate commerce when the accident occurred and therefore could not re-

cover. This refusal is the sole ground upon which error is now asserted.

Two loaded coal cars coming from without the State were received in the carrier's yard at Fort Wayne, Indiana. They were destined to Olds' private switch-track connecting with the yard; and acting under instructions Donat commenced the switching movement requisite to place them thereon. There was evidence tending to show that in order to complete this movement it became necessary to uncouple the engine from the loaded cars and with it to remove two empty ones from the private track. While engaged about the removal defendant in error was injured. The trial court submitted to the jury for determination whether he was engaged in interstate commerce at the time of the injury, and in approving such action (224 Fed. Rep. 1021) the Circuit Court of Appeals was clearly right. *N. Y. Cent. & Hudson River R. R.* v. *Carr*, 238 U. S. 260, 262–263.

Affirmed.